U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 10 2001
WAC 03 227 53502

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a senior research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the petitioner submitted evidence of her achievements, including citations, and submits additional citation evidence. For the reasons discussed below, we find that the director erroneously focused on the petitioner's nonimmigrant status and failed to give sufficient weight to the evidence submitted.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Master's degree in Microbiology from Texas A&M University, awarded in December 1997. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm. 1998)[hereinafter "NYSDOT"], has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, microbiology, and that the proposed benefits of her work, the development of novel therapeutic agents against biowarfare pathogens, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

In evaluating this question, the director stated the following:

> The petitioner has not established that there is any real urgency to her entry into the United States in an immigrant status. . . . In fact, the petitioner must show that by not being given immediate immigrant status the national interest of the United States

> would actually be harmed. The petitioner has failed to establish that such harm to the national interest would occur if her employer took the extra time to obtain a labor certification through the normal labor certification process.

The director then noted the petitioner's nonimmigrant status and concluded that if the petitioner's employer applied immediately for an alien employment certification, the process "may even be completed" prior to the expiration of that status.

The language used by the director does not reflect the proper standard set forth in *NYSDOT*, 22 I&N Dec. at 217-18. That decision does state that the national interest waiver was not intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223. This language, however, merely emphasizes that the inconvenience of the process itself is not an argument to waive the requirement. Such language does not imply that the petitioner must demonstrate that there is any "urgency" to her adjustment to lawful permanent resident status. In fact, the AAO clearly stated that the inapplicability of the labor certification process is not, in and of itself, a basis to waive that process. *Id.* at 218, n. 5. Thus, had the petitioner demonstrated that the labor certification process would have lasted longer than her nonimmigrant status, that information would not have justified the waiver.[1] In light of the above, the director erred in making this issue the focus of his decision.

Several of the references discuss the importance of researching means to counter bioterrorism. Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner submitted several letters from colleagues and two letters from independent members of her field. In his final decision, the director concluded that "some" of the letters "appear to be more akin to reference letters than to testimonials to her individual potential to benefit the country on a national

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[1] The director's analysis would favor aliens who file their petitions later in their stay as a nonimmigrant rather than those with superior achievements.

impact level." The director further states that the opinions in the letters were "highly subjective" and unsupported by more objective evidence. The distinction between "reference letters" and "testimonials" is not immediately clear. Moreover, as noted by the petitioner on appeal, the director failed to address the objective evidence submitted in support of the assertions in the letters, such as the evidence that the petitioner's work is well cited.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of industry interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through her reputation and who have applied her work are the most persuasive.

As stated above, the petitioner received her Master's degree from Texas A&M University in 1997. from March 1998 through April 2003, the petitioner worked for Microcide Pharmaceuticals, which then became Essential Therapeutics. The petitioner then joined her current employer, Anacor Pharmaceuticals. As of the date of filing, the petitioner had only worked for Anacor for three months. Thus, while we acknowledge that the petitioner's proposed work on anti-bioterror agents would have benefits that are national in scope, we must examine her past work for Essential in order to ascertain whether she had already demonstrated sufficient accomplishments such that future benefits in the field are not merely speculative.

[redacted], the Associate Director of Discovery Biology at Essential and the petitioner's coauthor on three articles, discusses the petitioner's work at Essential. Specifically, the petitioner "was very instrumental in the development of intricate biochemical assays to study" antimicrobials that inhibit the activity of multidrug resistant pumps, membrane transporters that confer resistance to unrelated antibiotics. The petitioner demonstrated that "various substrates were captured by the pump in the periplasm of gram-negative bacteria," impacting the design of pump inhibitors as novel antimicrobial agents. [redacted] characterizes this work as a "major discovery" and asserts that the petitioner's article reporting these results was "selected as paper of the month." Although the paper of the month selection is not documented in the record, the petitioner did submit evidence that this article had been cited 17 times as of the date of filing. On appeal, the petitioner documented

that the number of citations had risen to 33.[2] While the petitioner must establish eligibility as of the date of filing in 2003, *see* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971), the continued citation of the petitioner's article demonstrates that this work, completed, published and moderately cited as of the date of filing, continues to influence current research.

[redacted] a former employee at Essential and one of the petitioner's coauthors, notes the petitioner's experience with both gram-positive and gram-negative bacteria as well as with "a number of fungal pathogens." [redacted], an associate director of the Biology Group at Essential, discusses the growing threat of life-threatening fungal infections and asserts that the petitioner helped in the development of a new anti-fungal agent the company plans to "enter clinical trials."

[redacted], a research microbiologist at the Center for Veterinary Medicine, U.S. Food and Drug Administration, asserts that he learned about the petitioner's work at a scientific conference and has been "following her career ever since." He asserts generally that the petitioner has "facilitated the work of many other scientists." While he does not identify the other scientists or assert that his own research has been influenced by the petitioner, the record contains evidence that three of the petitioner's articles have been moderately cited. Moreover, the record contains a letter from [redacted] an assistant professor at the University of Oklahoma, who states:

> [The petitioner's] research greatly impacted my own research interests, which are focused on the mechanistic studies of bacterial multidrug resistance. In particular, her recent article in the journal [*Molecular Biology*] . . . addressed a very important question how multidrug proteins are able to recognize such broad spectrum of antimicrobial agents. This question is of particular interest to us. Using knowledge obtained through genetic studies of bacterial cells such as those published by [the petitioner], we design biochemical assays, which could be used to gain insight into how mechanistically multidrug proteins protect bacterial cells from antimicrobials. Review articles and research manuscripts which I wrote recently invariable cite [the petitioner's] work as a major contribution to the field.

The record confirms that [redacted] has cited the petitioner, including in a review article coauthored with [redacted] Notably, several of the citations of the petitioner's work appear in review articles. For example, [redacted] of Tufts University not only cites the petitioner's article in a "Minireview" but also discusses how this work can be applied. In an article discussing the use of genomics in revolutionizing drug discovery in *Current Opinion in Microbiology,* the authors cite four articles reporting the significance of efflux pumps in mediating resistance but single out the petitioner's article as being "of special interest." In a Minireview published in the *Journal of Bacteriology,* the authors discuss recent research on MexB, concluding that the petitioner's article represented the "study with the highest resolution." In addition, a review article by [redacted] cites the petitioner's articles as one of five studies that "can assist in rational inhibitor design." Finally, while the petitioner did not

[2] This article has now been cited 77 times according to http://scholar.google.com (accessed Aug. 27, 2007).

submit the portion of text where she is cited, she did document that she was cited in an "Interim Report on Genomics of *Escherichia Coli,*" appearing in the *Annual Reviews on Microbiology.* The above discussions in review articles are objective evidence that supports the assertions by the petitioner's references as to the significance of her work.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the above testimony, and further testimony in the record, establishes that the microbiology community recognizes the significance of this petitioner's research rather than simply the general *area* of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the alien employment certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.